Supreme Court, U.S.
FILED
OCT 4 1991
OFFICE OF THE CLERK

(2)

No. 91-85

In The

Supreme Court of the United States

October Term, 1991

ADAM SPARKS,

Petitioner,

vs.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

CITY AND COUNTY OF SAN FRANCISCO,

Real Party in Interest.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUISE H. RENNE
City Attorney
*DENNIS AFTERGUT
Chief Assistant City Attorney
SHAUN G. CLARKE
MICHELLE E. GOLDBERG
Deputy City Attorneys
1390 Market Street, 6th Floor
San Francisco, CA 94102
(415) 554-3918

Counsel for Real Party in Interest

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction and Summary of Argument 2

Statement of the Case 4

Reasons Why the Petition Should be Denied 7

I. THE STATE APPELLATE COURT'S CONTEMPT DECISION IS VALID REGARDLESS OF THE CONSTITUTIONALITY OF THE UNDERLYING ORDINANCE 7

A. Sparks Was Obligated To Obey The Injunction 7

B. Sparks Had An Opportunity To Seek Direct Review Of The Injunction But Failed To Do So 9

C. This Court Should Apply Federal Law .. 10

II. THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF THE ORDINANCE'S TOURIST RENTAL PROVISIONS BECAUSE THE CONTEMPTS WERE BASED SOLELY ON SPARKS' FAILURE TO MAINTAIN RECORDS AND ALLOW AN INSPECTION 11

III. THE APPELLATE COURT CORRECTLY DECIDED THAT THE ORDINANCE IS FACIALLY CONSTITUTIONAL 13

A. The Ordinance Does Not Deny All Economically Viable Use Of The Property .. 14

B. The Ordinance Substantially Advances Legitimate State Interests 16

TABLE OF CONTENTS – Continued

Page

IV. THE APPELLATE COURT CORRECTLY DECIDED THAT PETITIONER HAD NO RIGHT TO A JURY IN HIS TRIAL FOR PETTY OFFENSES..... 18

Conclusion..... 20

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 14

American Savings and Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981) 14

Bethlehem Mines v. United Mine Workers, 476 F.2d 860 (3d Cir. 1973) 9

Bullock v. City and County of San Francisco, 221 Cal. App. 3d 1072 (1990) 13, 17

Cherokee Express, Inc. v. Cherokee Express, Inc., 924 F.2d 603 (6th Cir. 1991) 9

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) 18

Cooper's Express Co., Inc. v. Interstate Commerce Comm'n, 330 F.2d 338 (1st Cir. 1964) 12

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 14

Glen v. Hongisto, 438 F. Supp. 10 (N.D. Cal. 1977) 10

GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980) 9

Harriman v. City of Beverly Hills, 275 Cal. App. 2d 918 (1969) 12

Howat v. State of Kansas, 258 U.S. 181 (1922).. 7, 8, 10, 11

In Re Berry, 68 Cal. 2d 137 (1968) 10, 11

In Re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722 (9th Cir. 1989) 9

In re Morelli, 11 Cal. App. 3d 819 (1970) 18

Johansen v. San Diego County District Council of Carpenters, 745 F.2d 1289 (9th Cir. 1984) 7, 9

TABLE OF AUTHORITIES – Continued

Page

Karr v. Baldwin, 57 F.2d 252 (N.D. Tex. 1932) 12

Loretto v. Telepromptor Manhattan CATV Corp., 458 U.S. 419 (1982) 15, 17

Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 13

MacLeod v. Santa Clara County, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S 1009..... 15

Maness v. Meyers, 419 U.S. 449 (1975) 9

Matia v. Whitmore, 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 10

Moore v. City of Costa Mesa, 786 F. Supp. 1448 (C.D. Cal. 1987) 15

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 3, 15, 17, 18

Oceanic California, Inc. v. City of San Jose, 497 F. Supp. 962 (N.D. Cal. 1980) 15

Pacific Telegraph & Telephone v. Superior Court, 265 Cal. App. 2d 370 (1968) 19

Pannell v. City of San Jose, 485 U.S. 1 (1988)..... 13

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 9

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 14, 15

People v. White, 259 Cal. App. 2d Supp. 936 (1968) 12

Rife v. Godbehere, 814 F.2d 563, *as amended*, 825 F.2d 185 (9th Cir. 1987)..... 19

TABLE OF AUTHORITIES – Continued

Page

Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984) 17

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989) 15, 16, 17, 18

Taylor v. Hayes, 418 U.S. 488 (1974) 18, 19

Terminal Plaza v. City and County of San Francisco, 177 Cal. App. 3d 892 (1986) 13, 17

Traweek v. City and County of San Francisco, 659 F. Supp. 1012 (N.D. Cal. 1986), *aff'd in part and rev'd in part*, 920 F.2d 589 (9th Cir. 1990) 15

United States v. United Mine Workers, 330 U.S. 258 (1947) 7

Walker v. City of Birmingham, 388 U.S. 307 (1967) ..... *passim*

William C. Haas & Co., Inc. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) 15

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 12

STATUTES

California Civil Code
Section 1209 18

California Government Code
Sections 7060-7060.7 16

Sections 65580, 65589.5, 65915, 66412.3 17

San Francisco Administrative Code
Chapter 41.2 4

Chapter 41.3(d) 4, 16

Chapter 41.3(e) 4

No. 91-85

In The

Supreme Court of the United States

October Term, 1991

ADAM SPARKS,

Petitioner,

vs.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

CITY AND COUNTY OF SAN FRANCISCO,

Real Party in Interest.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Real Party in Interest City and County of San Francisco (the "City") files this brief in opposition to the Petition for a Writ of Certiorari and prays that the Writ be denied. The California Court of Appeal has correctly held Petitioner Adam Sparks to be in contempt of the California Superior Court's Preliminary Injunction and has correctly determined that Sparks was not denied any right to a jury trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an action by the City and County of San Francisco to enforce its Residential Hotel Unit Conversion and Demolition Ordinance (the "Ordinance"), the California Superior Court enjoined petitioner Adam Sparks from violating the Ordinance and subsequently twice held Sparks in contempt. The California Court of Appeal, in two separate unpublished decisions, upheld the preliminary injunction and six counts of contempt. The California Supreme Court denied review of both decisions. Having failed to seek a timely direct review of the preliminary injunction decision, Sparks now seeks certiorari only as to the second appellate decision, that which upholds the six counts of contempt. Sparks challenges the contempts by arguing that the Ordinance upon which the injunction was based is unconstitutional. Additionally, Sparks argues that he was denied his right to a jury trial.

Although Sparks urges this Court to declare the Ordinance's tourist rental provisions unconstitutional, Sparks' argument fails for several reasons. First, under federal law, Sparks cannot raise as a defense in this contempt proceeding the unconstitutionality of the preliminary injunction or its underlying law. The appellate decision upholding the injunction is a final judgment that cannot now be challenged in this contempt proceeding. Second, the constitutionality of the tourist rental provisions is irrelevant given that Sparks was not held in contempt for violating the injunction's tourist rental provisions; rather, Sparks was found guilty of violating the injunction's basic recordkeeping and inspection requirements – requirements that raise no constitutional issues. Finally, even if this Court were to reach the issue of the

constitutionality of the Ordinance's tourist rental provisions, the Ordinance does not effect a taking as Sparks alleges.

The petition to this Court attempts to manufacture a false conflict between the holding of the California Court of Appeal and the federal courts. Given that the federal courts have yet to rule on the constitutionality of the Ordinance, and that the state appellate court's opinion is fully consistent with this Court's decision in *Nollan*, Sparks' predictions regarding the content of any *future* federal decisions are speculative at best.[1]

This Court must also reject Sparks' attempt to concoct a conflict between the California and New York

---

[1] Sparks' federal habeas petition, not presently before this Court, is currently pending before the Ninth Circuit. On June 17, 1991, Superior Court Judge Richard Figone enforced the six contempt counts by issuing an *Order of Commitment* that directed Sparks to surrender to the County Sheriff at 9:00 a.m. on June 19, 1991. Sparks filed his petition for writ of habeas corpus with the district court the next day. Judge Vukasin of the Northern District denied Sparks' federal habeas petition and declined to stay his sentence pending appeal. Citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the court held that Sparks was required to serve his jail term for violating the superior court's injunction, even if he believed the Ordinance to be unconstitutional, and even if the Ordinance was ultimately held to be unconstitutional.

On or about July 1, 1991, Sparks appealed the district court's denial of his federal habeas petition to the Ninth Circuit. The Ninth Circuit enjoined the superior court from enforcing its *Order of Commitment* pending further order; oral argument before the Ninth Circuit is scheduled for October 9, 1991.

courts. Sparks' argument is predicated on a patent misconstruction of the Ordinance. In reality, the San Francisco law is distinguishable from the New York City law and thus warrants different treatment under the constitution. This case presents no conflict in decisions and the petition should be denied.

STATEMENT OF THE CASE

The San Francisco Residential Hotel Unit Conversion and Demolition Ordinance ("the Ordinance") was enacted in 1979. It represented San Francisco's legislative response to the widespread conversion of residential hotels to tourist hotels that was causing a serious shortage of housing in San Francisco. *S.F. Admin. Code* Chap. 41.2. Similar to zoning provisions, the Ordinance froze in place the number of residential and tourist rooms at certain residential hotels and regulated future change.

The San Francisco Board of Supervisors enacted the Ordinance on the basis of a study by the Department of City Planning. The study showed that the number of residential hotel units in the City had decreased by nearly 20% between 1975 and 1979 due to the "vacation, conversion or demolition" of residential hotels. *Id.*, chap. 41.3(d). The Board found that "a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households" who traditionally had rented rooms at residential hotels. *Id.*, chap. 41.3(e).

Sparks purchased the Sequoia Hotel in 1984, more than three years after the Ordinance went into effect and

with full knowledge of its restrictions. Although Sparks purchased the hotel with the intention of converting it to tourist use, he initially operated as a residential hotel, consistent with the hotel's historical use. Following a minor fire, Sparks renovated the hotel with the specific goal of operating it as a tourist hotel. In July 1987, the hotel was re-named the Pacific Bay Inn and re-opened as a tourist hotel despite the Ordinance's prohibitions. Beginning in July 1987, and continuing until today, Sparks has operated the Pacific Bay Inn exclusively as a tourist hotel.

Because of Sparks' flagrant violations of the Ordinance, the City filed an enforcement action in December 1987. (California Superior Court, *CCSF v. Pacific Bay Inn and Adam Sparks*, No. 885-553.) The City alleged violation of the Ordinance as well as of the City's zoning laws that prohibited the operation of the Pacific Bay Inn as a tourist hotel in a residential neighborhood.[2] Sparks cross-complained, alleging that the City's enforcement of the Ordinance violated his constitutional rights.[3]

---

[2] Sparks, a licensed real estate agent, purchased the hotel with knowledge that the property was zoned RC-4. Under RC-4 zoning, tourist hotel use is prohibited unless the property owner has obtained a conditional use permit.

[3] The City's case was subsequently consolidated with an action against Sparks by the Tenderloin Housing Clinic, a non-profit housing organization. On August 26, 1991, and following a three-day court trial, Judge Richard Figone of the California Superior Court announced his tentative decision in favor of plaintiffs. Judge Figone found that Sparks had purchased his hotel in 1984 with the intent of making a profit as a tourist hotel. Moreover, in violation of the City's zoning laws, Sparks operated his hotel as a tourist hotel despite the fact that he had never

On April 6, 1988, the California Superior Court issued a Preliminary Injunction ordering Sparks to comply with the Ordinance by (1) not renting more than a certain number of units for tourist use; (2) keeping and posting specified records; and (3) allowing administrative inspections by City inspectors. Sparks argued that the Ordinance was unconstitutional and, on that basis, appealed the issuance of the Preliminary Injunction to the California Court of Appeal. The Preliminary Injunction remained in effect throughout the appeal.

In November 1990, the California Court of Appeal upheld the Injunction, finding the Ordinance to be constitutional on its face. As to Sparks' claims that the Ordinance was unconstitutional as applied, the appellate court held that the record did not disclose that Sparks had exhausted his remedies. Sparks' request for review by the California Supreme Court was denied on March 20, 1991.

Despite the Injunction, Sparks continued to defy the court's authority, and in February 1989, the superior court found Sparks in contempt on 32 separate violations of the Preliminary Injunction. Remarkably, even *after* being held in contempt in February, Sparks continued to ignore the Injunction. Thus, in November 1989, Superior Court Judge Claude D. Perasso *again* held Sparks in contempt, finding beyond a reasonable doubt that Sparks' defiance of the court's Injunction "ha[d] been intentional,

---

applied for or obtained the proper permits to run a tourist hotel in a residential neighborhood. Accordingly, Judge Figone permanently enjoined Sparks from operating the Pacific Bay Inn as a tourist hotel.

willful and with the intent to frustrate the processes of [the Superior] Court."

Sparks filed petitions for writs of habeas corpus and certiorari in the California Court of Appeal. The appellate court stayed enforcement of both contempt orders and undertook review. In January 1991, the Court of Appeal upheld six counts of contempt. These counts were based solely on Sparks' violation of the Injunction's recordkeeping and inspection provisions. Specifically, Sparks had failed to keep and post records required under the Ordinance, and had deliberately obstructed a City inspection in September 1989. After the California Supreme Court denied review, Sparks filed this petition for writ of certiorari. It is these six counts of contempt that are now before this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE STATE APPELLATE COURT'S CONTEMPT DECISION IS VALID REGARDLESS OF THE CONSTITUTIONALITY OF THE UNDERLYING ORDINANCE.

A. Sparks Was Obligated To Obey The Injunction.

Federal courts have long held that a party cannot challenge a contempt citation for violation of an injunction by raising the constitutionality of the underlying ordinance as a defense. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. State of Kansas*, 258 U.S. 181 (1922); *Johansen v. San Diego County District Council of Carpenters*, 745 F.2d 1289 (9th Cir. 1984). Thus, in the seminal case of *Walker v. City of Birmingham*, 388 U.S. 307

(1967), this Court held that violation of a duly issued court order may be properly punished as contempt, *even if the underlying statute or ordinance upon which the injunction is based is later found to be unconstitutional.*

In *Walker*, petitioners were prominent civil rights activists who were held in contempt by an Alabama court for violating an injunction prohibiting a scheduled civil rights march. That injunction was based on a Birmingham Ordinance that petitioners contended was unconstitutional on its face.

This Court recognized that "the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues . . . . " 388 U.S. at 316. Nevertheless, *this Court upheld the finding of contempt*, quoting its landmark decision in *Howat v. State of Kansas*, 258 U.S. 181 (1922):

> "An injunction duly issuing out of a court of general jurisdiction . . . must be obeyed . . . however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case.
>
> It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, *its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.*"

388 U.S. at 314 (quoting *Howat v. State of Kansas*, 258 U.S. at 189-190) (emphasis added).

More recently, in *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), this Court echoed the reasoning of *Walker*, holding that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." 445 U.S. at 386 (citations omitted). *See also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976); *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *In Re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-28 (9th Cir. 1989); *Johansen v. San Diego County District Council of Carpenters*, 745 F.2d 1289 (9th Cir. 1984).

B. Sparks Had An Opportunity To Seek Direct Review Of The Injunction But Failed To Do So.

The rule of *Walker* is especially applicable where, as here, the contemnor had an opportunity to challenge the validity of the injunction but failed to do so. Thus, because Sparks failed to seek timely review in this Court of the appellate court's preliminary injunction decision, that decision cannot be challenged in this contempt proceeding. *Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 607 (6th Cir. 1991) ("An appeal from a finding of contempt does not put in issue the validity of the underlying judgment from which the party has failed to perfect a timely appeal"); *Bethlehem Mines v. United Mine Workers*, 476 F.2d 860 (3d Cir. 1973) (if a party fails to appeal from a preliminary injunction that has been violated, the validity of the injunction is not at issue on appeal and cannot be urged as grounds to vacate the contempt order).

C. This Court Should Apply Federal Law.

Citing *In Re Berry*, 68 Cal. 2d 137 (1968), Sparks attempts to circumvent *Walker* by asking this Court to "defer" to California state law to determine whether he can challenge the constitutionality of the Ordinance in his federal contempt proceeding. In short, Sparks seeks to apply a California case over directly controlling United States Supreme Court authority. This argument runs roughshod over the consistent line of cases following *Walker*, and finds no support in logic or in law. *E.g., Glen v. Hongisto*, 438 F. Supp. 10, 16 n.10 (N.D. Cal. 1977) ("While petitioners urge that this Court adopt the *Berry* rule as the law of the case, such a course would be improper *in this federal court proceeding.*") (emphasis added). For example, in *Matia v. Whitmore*, 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975), the court applied *Walker*, not *Berry*:

> Petitioner apparently believes that the First Amendment entitled him to litigate the obscenity issue twice – once at the time the temporary injunction is issued and once at any subsequent contempt hearing. As was discussed above, . . . [o]nce . . . an injunction [is] properly issued, *the only consideration before the court in a contempt proceeding is if petitioner in fact violated the terms of the injunction.*

365 F. Supp. at 1336, citing *Walker* (emphasis added) (footnote omitted).

Nothing in *Howat*, *Walker*, *Matia*, or any other federal case indicates that the federal court should defer to or

apply the state court procedure.[4] Indeed, *Walker* implies just the opposite: The *Walker* Court uses the *federal* rule as the standard against which the state court rule of law must be compared. 388 U.S. at 314 (the Kansas "rule of state law accepted and approved in *Howat v. State of Kansas* is consistent with the *rule of law followed by the federal courts.*") (emphasis added).

Adam Sparks may disagree with the Residential Hotel Ordinance. But it is not the Ordinance nor its alleged unconstitutionality that is at issue here. Thus, under the federal collateral bar rule enunciated in *Walker*, the appellate court's contempt decision is valid regardless of the Ordinance's constitutionality.

II. THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF THE ORDINANCE'S TOURIST RENTAL PROVISIONS BECAUSE THE CONTEMPTS WERE BASED SOLELY ON SPARKS' FAILURE TO MAINTAIN RECORDS AND ALLOW AN INSPECTION.

If this Court does not apply *Walker* and reaches the constitutionality of the underlying order, the only issue is whether the *basis* for the contempt is constitutional. As stated earlier, the six counts of contempt before this Court

---

[4] Even if this Court were to apply state law, *Berry* is easily distinguishable. The law at issue in *Berry*, unlike the San Francisco Ordinance, had never before been given appellate scrutiny. Moreover, the order at issue in *Berry*, unlike the Preliminary Injunction in the instant case, had not been finally adjudicated as constitutional.

are based *solely* on Sparks' willful violation of the superior court's order to (a) maintain records and notices; and (b) allow City inspections. These are ministerial acts that Sparks easily could have performed regardless of the other aspects of the Ordinance, and they do not implicate *any* constitutional right.[5]

A government requirement to maintain daily business registers does not violate any federal constitutional right. *See Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Harriman v. City of Beverly Hills*, 275 Cal. App. 2d 918 (1969). Likewise, government requirements that a business or property owner permit inspection of records are constitutionally permissible. *See Cooper's Express Co., Inc. v. Interstate Commerce Comm'n*, 330 F.2d 338 (1st Cir. 1964); *People v. White*, 259 Cal. App. 2d Supp. 936 (1968); *Karr v. Baldwin*, 57 F.2d 252 (N.D. Tex. 1932).

The finding of contempt against Adam Sparks for failing to maintain records and allow inspections violated no constitutional right.[6] Thus, the constitutionality of the Ordinance's tourist rental provisions is irrelevant. Indeed, because this case can be disposed of on nonconstitutional grounds, this Court should not address the

---

[5] Because the Ordinance contains a severability clause, Sparks was required to comply with the recordkeeping and inspection provisions, even if he believed that the tourist rental provisions were unconstitutional.

[6] Indeed, Sparks never argued below that the recordkeeping and inspection requirements were unconstitutional. Thus, Sparks has failed to exhaust his remedies or has procedurally defaulted.

constitutionality of the Ordinance's tourist rental provisions. *See Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Pannell v. City of San Jose*, 485 U.S. 1 (1988).

III. THE APPELLATE COURT CORRECTLY DECIDED THAT THE ORDINANCE IS FACIALLY CONSTITUTIONAL.

Assuming *arguendo* that Sparks could hurdle the first two obstacles and establish that (1) the *Walker* rule does not apply, and (2) a constitutional issue is raised by recordkeeping and inspection requirements, the contempt finding should still be upheld because the underlying Ordinance is constitutional on its face.

The California Court of Appeal has thrice considered the issue and held the Ordinance to be facially constitutional. *See Terminal Plaza v. City and County of San Francisco*, 177 Cal. App. 3d at 912 (1986) (court explicitly rejects argument that the Ordinance effects an unconstitutional "taking" of property); *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072 (1990); and *Sparks v. City and County of San Francisco*.

Despite this precedent, Sparks asserts that the Ordinance is facially unconstitutional in that it effects a taking without just compensation in violation of the Fifth Amendment. The party challenging a government regulation as a taking must demonstrate that the statute either (1) denies all economically viable use of the subject property, or (2) does not substantially advance legitimate state

interests. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Sparks fails on both counts.[7]

A. The Ordinance Does Not Deny All Economically Viable Use Of The Property.

The fact that some restrictions have been imposed upon Sparks' use of his property does not establish that a taking has occurred. Regulation of private property constitutes inverse condemnation only where the regulation denies the landowner *all* reasonable economic and beneficial use of the property. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) (citing *Agins, supra*).

The Supreme Court has provided no "set formula" to determine when economic injuries caused by public action must be compensated by the government. However, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), this Court discussed several factors that bear on this issue: (1) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (2) the character of the governmental action (*i.e.*, is it a physical invasion or merely an adjustment of the benefits and burdens of economic life).

---

[7] Even before this Court can address Sparks' taking claim, Sparks must establish that he exhausted his administrative remedies. As set forth earlier, the California Court of Appeal found that Sparks had not done so.

Here, the Ordinance has not interfered with any of Sparks' *reasonable*, investment-backed expectations. When Sparks purchased the hotel in 1984, he was aware that historically it had been a residential hotel and was subject to the Ordinance. This situation is similar to that in *Traweek v. City and County of San Francisco*, 659 F. Supp. 1012 (N.D. Cal. 1986), *aff'd in part and rev'd in part*, 920 F.2d 589 (9th Cir. 1990), where the court rejected a taking claim because *the City permitted the existing use to continue*: "[T]he plaintiffs bought into a heavily regulated situation and were on notice that the City's condominium conversion regulations were subject to annual review." *Id.* at 1026.

Sparks bought a residential hotel with full knowledge of the Ordinance. He had no *reasonable* investment-backed expectation that he would be able to defy the law. Thus, he cannot meet the *Penn Central* test. *See MacLeod v. Santa Clara County*, 749 F.2d 541, 548-549 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009; *Moore v. City of Costa Mesa*, 786 F. Supp. 1448, 1451 (C.D. Cal. 1987) (no taking where property owner "able to continue to use his property for his home and business; he has merely been unable to build a new and more profitable building to replace the current buildings"); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 973-977 (N.D. Cal. 1980).

Moreover, the Ordinance does not result in a permanent physical invasion. This fact distinguishes the Ordinance from the laws at issue in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), as well as *Seawall*

Associates v. City of New York, 542 N.E.2d 1059 (1989), the case relied on by Sparks. In *Seawall*, the New York law required owners to rehabilitate and rent units to tenants; a vacancy constituted a violation of the ordinance. Here, no such forced rental exists. The City does not require hotel owners either to rehabilitate units or to keep them occupied. Indeed, the owner is free to go out of the residential market entirely under California law. *See* Cal. Gov't Code §§ 7060-7060.7. Thus, the Ordinance does not result in a physical invasion. It affects only economic use of the property and is precisely the sort of governmental action that results merely in "an adjustment of the benefits and burdens of economic life."

B. The Ordinance Substantially Advances Legitimate State Interests.

The second prong of the takings analysis is a determination as to whether the legislation advances a legitimate state interest. In the late 1970's, San Francisco's Department of City Planning conducted a study of the City's housing market. The study showed that the number of residential hotel units in the City had decreased by nearly 20% between 1975 and 1979 due to the "vacation, conversion or demolition" of residential hotels. *S.F. Admin. Code* Chap. 41.3(d).

Concerned that further elimination of residential units would exacerbate the housing shortage, the San Francisco Board of Supervisors enacted the Ordinance to halt the conversion trend, preserve the residential housing stock, and maintain a proper balance between residential and commercial uses. The Ordinance

accomplishes its legitimate state goals by regulating conversion or demolition of residential hotel rooms and by requiring one-for-one replacement if such residential units are converted to nonresidential uses.[8]

Because of this "fit" between the Ordinance and its legitimate purpose, the California appellate court has upheld the constitutionality of the Ordinance in three well-reasoned opinions. Thus, *Terminal Plaza v. City and County of San Francisco, supra,* 177 Cal. App. 3d at 912 (1986), *Bullock v. City and County of San Francisco, supra,* and *Sparks v. City and County of San Francisco,* each held that the Ordinance did not amount to a taking. Sparks urges this Court to ignore the *Terminal Plaza* decision. Alternatively, he argues that *Terminal Plaza* was overruled by *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).

Contrary to Sparks' assertion, *Nollan* did not radically alter the traditional takings analysis. *Nollan* held that a higher scrutiny of government regulation may be required where the police power involves a *physical invasion* of the property, such as the exaction of a public easement across the plaintiff's property in that case, 483 U.S. at 841, or the forced rentals at issue in the *Seawall*

---

[8] That states have broad powers to regulate housing conditions is beyond dispute. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982); *Sadowsky v. City of New York,* 732 F.2d 312 (2d Cir. 1984) (law limiting ability to demolish single room occupancy buildings in New York City, specifically intended to protect the poor and elderly occupants of these buildings, had a valid, even admirable, purpose). Moreover, the State of California has recognized that provision of housing for all economic segments of society should be a government priority. *See* Cal. Gov't Code §§ 65580, 65589.5, 65915, and 66412.3.

case, 540 N.E.2d at 1062-63.[9] However, with respect to other regulation of property rights that do not constitute a physical encroachment on land, such as the regulation at issue in this case, *Nollan* did not change the existing test: Land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991). Under *Nollan* and *Commercial Builders*, the Ordinance must be upheld as a constitutional regulation of land use.

IV. THE APPELLATE COURT CORRECTLY DECIDED THAT PETITIONER HAD NO RIGHT TO A JURY IN HIS TRIAL FOR PETTY OFFENSES.

Sparks also asserts that he was entitled to a jury trial on charges of violating California Civil Code Section 1209. The charge of contempt under Section 1209 is a "petty offense" that is punishable by no more than five days in jail and a one thousand dollar fine. Petty offenses do not require a jury trial. *See Taylor v. Hayes*, 418 U.S. 488, 495 (1974); *In Re Morelli*, 11 Cal. App. 3d 819, 850

---

[9] The New York City law at issue in *Seawall* effected a physical taking in that the hotel owners were required to rent their property to strangers. In contrast, there is no physical invasion under the San Francisco Ordinance because vacancy does not constitute a violation of San Francisco's Ordinance. *Seawall* is also distinguishable because the New York law did not advance its stated purpose of alleviating the homelessness problem. San Francisco's one-for-one replacement provisions, however, do advance the City's goal of preserving the available residential housing stock.

(1970); *Pacific Telegraph & Telephone v. Superior Court*, 265 Cal. App. 2d 370, 375 (1968).

Sparks attempts to create a jury "right" where none exists by aggregating the penalties to which he *might* have been subjected under the 178 separate counts of contempt originally found by the trial court. But Sparks was not entitled to a jury trial on any *one* of those 178 counts. Thus, the assertion that Sparks' potential sentence raises a constitutional right to a jury is without merit.

Finally, even assuming *arguendo* that Sparks had been entitled to a jury trial, any constitutional violation was remedied when the actual penalty imposed was less than six months in jail and less than $5,000 in fines. *See Taylor v. Hayes, supra* (trial by jury not required where state reduces sentence to six months or less); *Rife v. Godbehere*, 814 F.2d 563, *as amended*, 825 F.2d 185 (9th Cir. 1987) (constitutional violation remedied by state court's ultimate imposition of sentence not exceeding six months).

CONCLUSION

No court issues contempt findings lightly. Two California state court judges and one federal district court judge believed that Sparks' intentional violation of the injunction was serious and required an appropriate sanction. There is a strong public interest in upholding injunctions issued by state court judges and in allowing penalties to be enforced for violating those injunctions. Sparks' petition for a writ of certiorari should be denied.

DATED: October 4, 1991

Respectfully submitted,

LOUISE H. RENNE
City Attorney
*DENNIS AFTERGUT
Chief Assistant City Attorney
SHAUN G. CLARKE
MICHELLE E. GOLDBERG
Deputy City Attorneys
1390 Market Street, 6th Floor
San Francisco, CA 94102
(415) 554-3918

Counsel for Real Party in Interest
City and County of San Francisco

*Counsel of Record